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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No.

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WILLIE WILLIAMS and SAM MARTIN

*Petitioners*

vs.

JOSEPH N. SHAFFER, ET AL.

*Respondents*

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## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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## BRIEF IN OPPOSITION OF THE STATE OF GEORGIA AS A RESPONDENT

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### OPINION BELOW

The opinion of the Supreme Court of Georgia is found in *Williams v. Shaffer, et al.*, 222 Ga. 334, 149 S.E. 2d 668 (1966). A motion for rehearing was denied on July 7, 1966, with no further opinion being given in connection with such denial.

## JURISDICTION

Petitioners concede that the Supreme Court of Georgia did not rule upon their constitutional contentions. [See Petition for Writ of Certiorari, p. 10]. They further show that the decision was wholly based upon the Georgia Supreme Court's holding that neither injunctive nor declaratory relief is available under Georgia law where all that is sought to be enjoined or declared illegal has already occurred [*Id.* at 16, Ga.]. Petitioners nonetheless seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257 (3) on the ground that during the proceedings in the State courts they had asserted a deprivation of rights under the United States Constitution. This Respondent, because of the foregoing admissions and for the reasons hereinafter set forth in the argument portion of this brief, respectfully submits that certiorari should be denied for reason that the decision of the Supreme Court of Georgia was based entirely upon adequate non-federal grounds.

## QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Georgia was based upon adequate non-federal grounds.

2. Whether a statutory requirement that a tenant desiring to arrest dispossessory proceedings tender a bond with good security payable to the landlord violates "equal protection" and "due process" rights of indigent tenants under the Fourteenth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which would have been involved had the case turned on Peti-

tioner's constitutional contentions rather than upon non-federal grounds relating to the unavailability of either injunctive or declaratory relief in the circumstances presented, would be those provisions set forth in pages 3 through 5 of Petitioner's Petition for Writ of Certiorari.

## STATEMENT

Petitioners are former tenants in premises owned by Respondent Joseph N. Shaffer who were evicted therefrom under dispossessory warrants which said Shaffer obtained pursuant to Georgia Code Annotated, Sections 61-301 and 61-302, upon his affidavit that they had failed to pay rent.[1] Petitioners did not file the counter-affidavits and bonds which Georgia Code Annotated, Section 61-303, specifies as the legal procedure to arrest dispossessory proceedings and obtain judicial review thereof. Instead, they proceeded to seek equitable and declaratory relief in the Superior Court of Fulton County, alleging, *inter alia,* that they had no adequate remedy at law because Georgia Code Annotated Section 61-303 was unconstitutional under the "due process" and "equal protection" clauses of both the State and Federal constitutions [R. 4][2]. It appeared from the factual allegations in their original petitions of "poverty" and inability to post bond [R. 5] that the precise portion of the statute

[1]Petitioners say that the rent in issue is seventeen dollars a week in the case of Williams and six dollars a week in the case of Martin [See Petition for Certiorari, p. 7].

[2]The two cases, while originally separate, were consolidated for decision by the Supreme Court of Georgia since the relevant facts and issues are identical. Unless otherwise indicated, the record page number is the same for the record in both cases. Where such record page numbers differ (M) denotes the record in *Martin v. Shaffer* while (W) denotes the record in *Williams v. Shaffer.*

which Petitioners contended to be unconstitutional was that proviso following the declaration of a tenant's right to arrest dispossessory proceedings by counter-affidavit. The proviso reads:

> "Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

On the other hand, Petitioners prayed for declarations that Code Section 61-303 as a whole was unconstitutional[3] and for injunctions restraining their eviction [R. 5 (M), 6 (W)]. Upon motions of Respondent Shaffer, the Superior Court of Fulton County entered orders dismissing the petitions [R. 16 (M), 17 (W)].

From these orders, Petitioners appealed to the Supreme Court of Georgia. In their briefs to that court Petitioners candidly pointed out that the trial court had refused to stay the dispossessory proceedings, and that in fact, they had already been evicted. The Supreme Court of Georgia held that since all that was sought to be enjoined was fait accompli the suits had become moot with neither injunctive nor declaratory relief being available to Petitioners. See *Williams v. Shaffer, et al.*, 222 Ga. 334, 335-36, 149 S.E. 2d 668 (1966). Petitioners now seek this Court's review of the Supreme Court of Georgia decision.

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[3]This notwithstanding the fact that if the entire code section rather than merely the bond proviso were to be declared unconstitutional, the obvious result would be to completely foreclose any resort to the courts whatsoever under this Code Chapter (i.e. 61-3) by a tenant seeking to arrest a dispossessory proceeding.

## STANDING OF THE STATE OF GEORGIA

While the State of Georgia was not named as a party defendant in the petitions which Petitioners filed in the Superior Court of Fulton County, it is the position of the State that where as here a litigant seeks to have a statute declared unconstitutional under the Georgia's Declaratory Judgment Act[4], the State is a statutory party to the proceedings whether or not it is expressly named as a party defendant. This contention is based upon *Georgia Laws* (1945) pp. 137, 138 (Ga. Code Ann. § 110-1106), wherein the General Assembly, recognizing the interest of the State in asserting the validity of its own statutory enactments and the problem created where neither the State nor any of its officials are named as parties defendant in the petition, provided as follows:

> "RIGHTS OF PERSONS NOT PARTIES. STATE AND MUNICIPALITIES AS PARTIES.—No declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding involving the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard as a party. *If a statute of the State,* or any franchise granted by the State is alleged to be unconstitutional, *the Attorney General of the State shall be served with a copy of the proceeding and shall be entitled to be heard.* [Emphasis added][5]

That the Supreme Court of Georgia interprets this statute as causing the State to be statutory party to the proceeding would appear to be implicit in the fact that the State's brief was filed as a party and not as an *amicus*

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[4]Ga. Laws (1945) pp. 137 et seq., as amended. [Ga. Code Ann. §§ 110-1101 to 110-1111.]

[5]Ga. Code Ann. § 110-1106.

*curiae* [See Petition for Certiorari, p. 9][6]. Inasmuch as it was a party to the proceeding in the Supreme Court of Georgia, the State contends that it is a Respondent in the instant proceeding even though not named as such in the Petition for Certiorari [Petitioners did serve the State with copies of said Petition].

## ARGUMENT

### I. The decision of the Supreme Court of Georgia was wholly based upon non-federal grounds; such grounds were adequate to support the decision and certiorari should therefore be denied.

As we have already pointed out in the section of this brief dealing with jurisdiction, Petitioners concede that the Supreme Court of Georgia did not rule upon their constitutional contentions. Petitioners' suits, from which their appeals to the Supreme Court of Georgia were taken, were suits for declaratory and injunctive relief [R. 1-7]. They sought, *inter alia*, to enjoin their evictions from Respondent Shaffer's premises on the theory that they had no adequate remedy at law [i.e. through arrest of the dispossessory proceedings pursuant to statute] due to the facial and "as applied" unconstitutionality of Georgia Code Annotated, Section 61-303, which required them to tender bond with good security, notwithstanding their alleged "poverty," in order to arrest the statutory dispossessory proceedings [R. 4]. Petitioners further asked for declaratory relief concerning this alleged un-

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[6]While not shown in the record, the case was in fact argued by the State before the Supreme Court of Georgia as an Appellee. Under Rule 5 of the Supreme Court of Georgia, interested persons who are not parties to the cause may submit briefs *amicus curiae* but are *not* permitted to argue orally.

constitutionality of Georgia Code Annotated, Section 61-303 [R. 5 (M), 6 (W)].

It is undisputed, and indeed Petitioners frankly admit that at the time their appeal of the trial court decision came on before the Georgia Supreme Court for hearing, they were no longer in the position of being threatened with eviction but in fact had already been evicted [See Petition for Certiorari pp. 16, 5a]. Accordingly, the Supreme Court of Georgia held that their suits to enjoin their removal from the rented premises had become moot. *Williams v. Shaffer, et al.*, 222 Ga. 334, 336, 149 S.E. 2d 668 (1966). The prayer for declaratory relief was similarly disposed of, the Court pointing out that where the rights of the parties have already accrued and no facts or circumstances are alleged to show that an adjudication of such rights is necessary to relieve Plaintiffs from taking any future undirected action incident to their rights, where such undirected action would jeopardize their interests, the suit is not only moot but sets forth no cause for declaratory relief [*Ibid*].

Obviously, we do not dispute Petitioners' contention that in cases where federal constitutional claims have been asserted the lower court's conclusion of mootness is not *necessarily* binding. In *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964), for example, this Court rejected the state court's finding of mootness. It was noted that a decision of the federal issue on the merits would be determinative of the Petitioners' right to recover on an injunction bond in the event that the injunctive suit there involved had been wrongfully sued out. Consequently, this Court held that the case could not be said to be one where a decision on the merits would not affect the rights of the litigants [375 U.S. at 306]. No such residual rights exist, of

course, regarding the litigants in the case at bar. Surprisingly enough, Petitioners also cite *Love v. Griffith,* 266 U.S. 32 (1924) in support of their contentions regarding mootness. Actually, this latter case furnishes more potent ammunition in favor of denying the writ and we think *Love* should be adopted as controlling in the instant case. To start with, the fact situation in *Love* was extreme. The Democratic Executive Committee of Houston, Texas, had passed a rule disallowing Negroes to vote in a particular primary election. A suit to enjoin enforcement of such rule had been thrown out on demurrer, and when the matter came on for hearing before the state appellate court, the primary election had already been held. The appeal was consequently dismissed as moot. This Court, while noting that where there is a plain assertion of federal rights in the lower court local rules as to how far it should be reviewed on appeal did not necessarily prevail and that whether the right was denied or not given due recognition by the state court was a question which the Supreme Court of the United States could decide, nevertheless affirmed. The rationale was that inasmuch as the election had passed no constitutional right had been infringed by the state court's mere holding that the cause of action had ceased to exist. The bill there as here was for an injunction which under state law could no longer be granted. In the words of this Court:

> "There was no constitutional obligation to extend the remedy beyond that which was prayed." *Love v. Griffith, supra,* at p. 34.

Apparently in an attempt to avoid the clear implication of *Love v. Griffith* respecting the present situation, Petitioners go on to argue that the case at bar is not moot because, they say, the Georgia courts could issue a mandatory injunction to restore possession of the premises

to Petitioners. Petitioners frankly concede their inability to locate any Georgia decision allowing the issuance of a mandatory injunction of this sort [See Petition for Certiorari, p. 18]. There is a reason for Petitioners' inability. The reason is that Georgia law is well settled adversely to their "mandatory injunction" argument. Not only does Georgia Code Annotated, Section 55-110 expressly prohibit the issuance of a mandatory injunction, but the Supreme Court of Georgia has held that under this statute an injunction will not issue to require a defendant in actual possession of land to relinquish possession to a plaintiff. E.g. *Horton v. Harvey,* 219 Ga. 265, 133 S.E. 2d 35 (1963); *Bush v. City of Gainesville,* 206 Ga. 182, 186, 56 S.E. 2d 478 (1947).

The Supreme Court of Georgia correctly decided that under Georgia law the cause of action asserted by Petitioners [i.e. one for injunctive and declaratory relief] had ceased to exist. This Respondent submits that under *Love v. Griffith, supra,* this non-federal ground is adequate to support the decision of the Supreme Court of Georgia, and that in accordance with the long standing jurisdictional policy of this Court, the Writ of Certiorari should be denied. See e.g. *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Wood v. Chesborough,* 228 U.S. 672, 676-80 (1912); *Accord, Fay v. Noia,* 372 U.S. 391, 428-430 (1963).

**2. The requirement of Georgia Code Section 61-303 that a counter-affidavit and bond be furnished by a tenant seeking to arrest dispossessory proceedings is a reasonable protection of the property rights of owners of rental property and does not violate any right secured to Petitioners by the**

**"equal protection" or "due process" clauses of the Fourteenth Amendment.**

It would seem to this Respondent to be a strange "constitutional right" which would permit one citizen, however impoverished, to alleviate his unfortunate condition by expropriating the property of another private citizen. Yet this is the base upon which Petitioners' constitutional assertions stand. The dispossessory proceeding authorized by Chapter 61-3 of the Georgia Code is a summary proceeding whereby a property owner is permitted to assume possession not of another's, *but of his own property*[7] upon his oath that the person in possession has failed to pay rent, is a tenant at will or sufferance, or has held over and beyond the term of the lease. Ga. Code Annotated, Section 61-301. It is the manifest intention of this Code provision to afford some protection to the property rights of owners of rental property. We submit that it is equally manifest that to allow a tenant to arrest his dispossession by mere counter-affidavit and without furnishing the bond required by Code Section 61-303, would render this protection meaningless. Any tenant, at little or no cost to himself, could arrange to receive six months or more free rent by the simple expedient of contesting his dispossession. Assuming the property owner prevails against an indigent tenant, he would have but an empty judgment with no real remedy whatsoever respecting his financial loss.

A wrongful eviction, on the other hand, does not leave the tenant who is unable to post bond without remedy. Under Georgia law, such tenant would have an action in tort for wrongful eviction. *Mizell v. Byington,* 73 Ga.

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[7]The interest of a tenant in Georgia is usufructuary only and does not amount to an estate. See Ga. Code Ann. § 61-101.

App. 872, 875, 38 S.E. 2d 692 (1946); *Yopp v. Johnson*, 51 Ga. App. 925 (1), 181 S.E. 596 (1935). Moreover, while equity will not normally interfere with statutory remedies to collect rent and recover premises, and while inability to post bond would not *ipso facto* afford grounds for equitable relief in Georgia, e.g. *Flynn v. Merck*, 204 Ga. 420, 49 S.E. 2d 892 (1948) it would seem to be clear beyond doubt that should other equitable issues (e.g. fraud on the part of the landlord) be involved the tenant would have a remedy in equity which could well include the enjoining of the prosecution of a dispossessory warrant. See e.g. *Sims v. Etheridge*, 169 Ga. 400 (1), 150 S.E. 647 (1929); *Accord, Flynn v. Merck, supra*, at 204 Ga. 424.

This Respondent submits that decisions of this Court involving bond requirements affecting the ability of convicts to review the legality of their conviction, e.g. *Griffin v. Illinois*, 351 U.S. 12 (1955); *Burns v. Ohio*, 360 U.S. 252 (1959) and *Smith v. Bennett*, 365 U.S. 708 (1961) are simply not apropos to the present situation. Here we have a legislative attempt to balance economic and proprietary interests of different classes of private citizens and not a question of deprivation of personal liberty by the State through the foreclosing of a convict's right to have his conviction reviewed solely on the basis of his means. Here the tenant seeking to arrest dispossessory proceedings and obtain judicial determination of the issue is required to post bond as a condition of his right to obtain judicial determination of the matter. This Court has heretofore held that the Fourteenth Amendment did not prohibit a state from prescribing a reasonable and appropriate condition precedent to the seeking of judicial relief through legal proceedings of a specified kind or class so long as the basis of the distinc-

tion is real and the condition imposed has a reasonable relationship to a legitimate legislative object as it does here. See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924). The United States Congress has frequently placed similar limitations on the right of access to the federal courts. See e.g. 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 107 (injunction in labor disputes); 28 U.S.C. § 1446 (removal of cases); Rule 65, Fed. R. Civ. Proc. (temporary restraining order).

## CONCLUSION

For the reasons set forth herein, this Respondent submits that the Petition for a Writ of Certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

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